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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 202.

NEW AMSTERDAM CASUALTY COMPANY,
PETITIONER,

VS.

THE MIAMI CONSERVANCY DISTRICT,
RESPONDENT.

PETITIONER'S REPLY BRIEF

Supporting Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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The second sentence on page 2 of respondent's brief declares: "There is no debatable question of *law* involved." The second paragraph of the decision of the court of appeals below begins with the statement: "There is no *factual* controversy."

We submit that both the brief and the decision then proceed to ignore most obvious facts and establish legal precedents in a manner that leaves one almost dizzy in a maze of misstatements, half-truths, and *non sequiturs.*

We feel that the most clarifying approach is to quote a few of these misstatements in bold-faced type and follow with a correction as disclosed by the admitted facts.

On page 3 of respondent's brief we find:

"Questions B, C, and D Are Not Involved."

Question B, which involves the effect of incorporating the bond in the principal contract, was definitely referred to in the decision of the trial court (R. pp. 59 and 62), and is basic in plaintiff's first cause of action.

When the court of appeals declared (R. p. 81): "The contract was * * * not between the district and the surety" by necessity, if not by direct reference, it must have overruled the trial judge on this point.

Questions C and D are essential premises to plaintiff's second cause of action. The court of appeals disposed of C with the statement (R. p. 83), "It is doubtful that a public body whose contractual powers are limited, may be made liable as to private parties in relations *quasi ex contractu.*"

Question D was answered by the court of appeals with the statement (R. p. 83):

> "The rights of a surety in such circumstances can rise no higher than the rights of materialmen and in as much as no steps were taken to perfect any lien against the public authority, or against the retained percentages of the contract price before it was paid out, it follows that the surety may not recover."

If questions "B, C, and D are not involved," then four judges in the two lower courts have reasoned in vain.

Respondent's brief, bottom p. 5, says:

"This Claim (for Overdepth Deductions) **Is Not Included in the Second Amended Petition in the District Court, and Was Ignored by Both Lower Opinions."**

It was omitted from the petition because the fact was unknown to plaintiff when the petition was filed. However, it was included in the agreed statement of facts and was expressly commented upon by the trial judge (R. 55. True, the court of appeals did ignore these erroneous payments in the same way that it ignored all other improper payments made by the obligee. We submit that this oversight by the court of appeals was largely responsible for its erroneous conclusion.

Respondent's brief (p. 6) says:

"Since the Final Payment, March 25, 1933, Was of Larger Amount Than the Total Claimed by Petitioner and Was Properly Made, Any Possible Incidental Errors Would Cause No Damage to It."

If the deductions had been made as required by the contract, the final payment would have been $27,443.57. This was more than enough to satisfy the bank and all materialmen, and if properly made, no loss would have occurred.

Respondent's brief (p. 6) says:

"It Is Petitioner's Contention That in Some Way the Fourth Proviso (of the Bond Conditions) * * * **Altered and Superseded the Provisions for Final Payment in the Work Contract."**

This is a most erroneous statement of plaintiff's contention. We have never averred that the fourth bond condition altered any provisions of the work contract.

The fourth bond provision merely stipulated that the obligee should enforce the contract as written, and specifically make all retentions which the work contract said the obligee was authorized to make. The work contract (R. 33) provides that the obligee might require satisfactory evidence that all material and labor bills are paid before paying the principal contractor. It also provides that the obligee might retain any amount deemed necessary until so satisfied. The obligee could, under the contract as written, without any alterations, have retained any percentage within the limits of good faith, until the period for lien notices was past.

The bond condition merely required that the obligee would retain ten per cent during that period. Certainly this provision makes no effort to alter the contract. It merely stipulates for the observation of the contract. If these retentions had been made as permitted by the contract, and required by the bond, there would have been no loss. The court of appeals below completely ignored the existence of the above contract provisions along with its many other oversights.

However, if respondent's brief is correct in its contention that the bond provisions to be effective must alter the work contract, their conclusion that such an alteration violates Ohio General Code, Section 6828-16, and that therefore certiorari should not be granted, does not follow, because:

1. There is nothing in Ohio General Code, Section 6828-16, which limits the power of the conservancy board of directors to put any proviso in the work contract which it deems advisable, provided the same contract is submitted to all bidders. In the case at bar it was provided in the work contract that whatever bond was subsequently accepted by the board should be included in the work contract. This same offer was made to all bidders, because the work contract was prepared long in advance of the bids, and a copy thereof given to each bidder,

and each bidder knew that the bond which he submitted would be included in the work contract.

Therefore, the provisions of the bond were as much a part of the work contract as any other provisions therein, and when offered by the contractor and accepted by the board, it became equally binding upon the obligee, the principal, and the surety.

2. If the obligations of the bond are completely thrown out, as demanded by the respondent, plaintiff's second cause of action, which was on all fours with the plaintiff's cause of action in the four cases cited on page 9 of ~~respondent~~ petitioner's original brief, still persists, and basic questions C and D, set out in respondent's brief, still remain unresolved.

Respondent's brief, on page 8, says:

> **"Having Admitted by the Agreed Statement of Facts That the Final Payment Was Made to the Contractor at the Time Required by the Work Contract, the Surety Company, to Sustain Its Position in This Action, Is Forced to Show That the Terms of the Work Contract Were in Some Way Changed, and That Change Was Binding on All Parties.**

Petitioner nowhere admits that the final payment was made at the time required by the work contract, nor do we contend that the terms of the work contract were changed. A third repetition of this same error is set out on page 9 in the last sentence of the first paragraph.

On page 11, respondent's brief says:

> **"The Next to the Last Paragraph** (R. 67) **of the District Court's Opinion Apparently Is Based upon a Misreading of a Sentence** (bottom, R. 35) **of the Contract. This Error Is Corrected by the Circuit Court of Appeals** (R. 83)."

If the paragraph of the district judge's decision, referred to above, is read in conjunction with the pre-

ceding paragraph, it becomes apparent that the district judge was interpreting the payment provisions in the work contract in the light of the contract provisions permitting a retention until releases were obtained (as hereinbefore quoted from R. p. 32). The trial court specifically refers to the fourth bond condition requiring all retentions to be made which the obligee was authorized to make. This alleged "error" was "corrected by the court of appeals" by ignoring all of the contract provisions printed on page 33 of the record, as well as all provisions in the bond.

On page 14 of their brief, opposing counsel seek to distinguish *Ft. Worth Independent School Dist.* v. *Aetna C. & S. Co.*, 48 F. 2d 1 (1931, C. C. A. 5), and *National Surety Co.* v. *County Board of Education*, 15 F. 2d 993 (1926, C. C. A. 4), because in those cases payments were admittedly made to the contractor before they were due. Whereas, opposing counsel say the payment in the case at bar was properly made.

The record herein discloses that the payment on December 8, 1932, was too large by $1,313.87; the payment on January 9, 1933, was too large by $7,612.11; the payment on February 2, 1933, was too large by $7,500; and the payment on March 23, 1933, should not have been made at all until releases were obtained, but when made was $7,500 too small.

Opposing counsel seek to distinguish *Claiborne Parish School Board* v. *Fidelity & Deposit Co.*, 40 F. 2d 577 (1930, C. C. A. 5), by saying that the obligee had notice of unpaid materialmen in that case, whereas they did not have notice in the case at bar. It is true that this distinction does exist, but the reason of the court in the Claiborne case clearly shows that the existence or nonexistence of notice of unpaid material claims at the time of final payment has no determining effect where the prior erroneous payments were of such a palpable nature as to be a probable cause of loss.

Opposing counsel cite *Milske* v. *Steiner Mantel Co.*, 103 Md. 234, which is a case where the bond was not statutory; where it attempted radically to change the work contract; and where the bond was not incorporated in the work contract. This case, in brief, lacks all three factors on which petitioner herein bases its first cause of action.

Opposing counsel say that there is nothing in the record to show that the bond involved herein was of general use throughout the country, and that therefore this case is not of general interest. Unfortunately, there was no occasion, prior to filing the petition for writ of certiorari, to inject this question in the record.

However, with very little search, we have found the identical bond form in litigation in the case of *Park et al.* v. *Brunswick*, 235 Mich. 210 (1926), in which the American Surety Company was using this bond.

The Decision Below.

In addition to the palpable oversights in the decision below, which we have indicated above, the decision has some very unusual characteristics which we feel should be brought to the attention of the court.

(R. p. 80:)

> *"It is further* (plaintiff's) *contention that the bond being statutory is incorporated in the contract, and that since the contract is incorporated in the bond by express reference, the two instruments must be read together."*

It is noted that the court below completely overlooked the additional contention that the bond was also *expressly* incorporated in the contract.

(R. p. 81:)

> *"It must be observed, however, that the contract was between the district and the construction company, and not between the district and the surety."*

The same statement could have been made concerning all of the cases cited on page 9 of petitioner's original brief, as well as in the case of *Hochevar* v. *Maryland Casualty Co.*, 114 F. 2d 943, decided by the Sixth Circuit itself, yet in each of these cases the surety recovered.

(R. p. 81:)

> *"Were we to view* (the fourth bond obligation) *as a promissory obligation of the district, it would require consideration of Sec.* 8324, *O. G. C."*

The court then proceeds to "consider" the Ohio Code section and seems to question its validity to create a lien. It bases its doubt on *In re Schilling*, 251 Fed. 966, which on page 971 very forcefully declares this statutory section *effective* in creating a lien. The court then leaves, suspended in the air and wholly undecided, both the nature of the bond provisions and the efficacy of the lien statute, while it proceeds to discuss a totally different proposition.

(R. p. 83:)

> *"It is DOUBTFUL that a public body whose contractual powers are limited, may be made liable as to private parties in relations quasi ex contractu."*

If so, why not resolve the "doubt" when the matter was directly before the court?

Conclusion.

The circuit court of appeals below based its decision primarily on three propositions; that the obligee had not signed the bond and was therefore not a party to it; that the obligee had finally paid the principal in full, without actual notice of outstanding claims; and that a governmental unit cannot be held to the accepted obligee liabilities in suretyship law, because such liabilities arise *quasi ex contractu.*

The decision ignored all admitted violations of the provisions of the bond, without deciding as to whether these provisions were conditions or promises. It failed even to mention the admitted violation of all contract provisions for installment payments and overdepth deductions. It refuses to mention or consider the express incorporation of the bond into the principal contract.

In short, all considerations which the trial court, as well as many other federal circuit courts have held to be determinative, the appellate court below ignored. This it did in what we submit was an unfortunate attempt to follow an Ohio State Court decision, involving easily distinguishable facts, expounding of *obiter dicta;* conflicting with decisions of higher state courts; and rendered after the rights of the parties herein had fully accrued.

If such is to be our future law of suretyship, we finally submit it ought to be set forth in clear, understandable reasoning by a court of final jurisdiction.

Respectfully submitted,

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